

IN THE

Supreme Court of the United States

October Term 1945—No. 378

AMERICAN BOWLING & BILLIARD
CORPORATION,

Petitioner,

vs.

THE BRUNSWICK-BALKE-COLLENDER
COMPANY,

Respondent.

PETITION OF AMERICAN BOWLING & BILLIARD
CORPORATION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, WITH BRIEF IN SUPPORT
THEREOF.

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM S. GLUCK,
WALTER A. DARBY,
Of Counsel.



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*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, American Bowling & Billiard Corporation, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered herein on June 11, 1945.

A transcript of the record of the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

**Summary and Short Statement of the
Matter Involved.**

1. Respondent, The Brunswick-Balke-Collender Company, is the oldest and largest manufacturer in the world of bowling alley equipment and accessories.

2. Petitioner, American Bowling & Billiard Corporation, also is engaged in the manufacture and sale of bowling alley equipment, and is a substantial competitor of respondent in that field.

3. Prior to the complaint in this action, respondent, for two consecutive years (1937 and 1938) conducted a promotional campaign called "Brunswick Sweepstakes" in which respondent offered prizes to bowlers throughout the United States who bowled on bowling alleys qualified under the plan. To qualify under the plan, respondent required the proprietors of bowling alleys to purchase from respondent a prescribed number of sets of pins and other supplies for each alley qualified, which purchase represented the seasonal requirement of the bowling alley proprietors for such pins and other supplies for each alley, and eliminated competition with respondent in the sale of such materials.

4. Prior to the complaint in this case the Federal Trade Commission instituted proceedings against respondent, identified as "In the Matter of The Brunswick-Balke-Clender Company, a Corporation, Docket No. 3604", charging respondent with violation of Section 3 of the Clayton Act (15 U. S. C. 14), by reason of respondent's so-called "Brunswick Sweepstakes" promotional plan.

5. On November 17, 1941 respondent instituted the present suit in the Southern District of New York charging petitioner with patent infringement and trade-mark infringement.

6. On March 23, 1942 petitioner filed its answer denying validity or infringement of both the patent and the trade-mark.

7. On December 7, 1942 the Federal Trade Commission filed its findings and conclusions in the proceeding

before it against the respondent, in which it was found and held that respondent, by its "Brunswick Sweepstakes" promotional plan, had violated Section 3 of the Clayton Act, and the Commission issued its "cease and desist order" as a result thereof (Vol. B, pp. 139-159). No appeal from this order was taken by respondent. To the contrary, the order was acquiesced in, and the "Brunswick Sweepstakes" plan was not thereafter perpetrated by respondent.

8. On January 11, 1943, promptly after the judgment of the Federal Trade Commission, petitioner, by stipulation, amended a counterclaim filed with its answer to charge respondent with violation of Section 3 of the Clayton Act by reason of respondent's "Brunswick Sweepstakes" promotional plan, praying for an accounting for the damages suffered by petitioner because thereof.

9. Trial was had of the cause beginning November 3, 1943. The evidence bearing on the issues of patent and trade-mark infringement was adduced. As to petitioner's counterclaim based on respondent's violation of Section 3 of the Clayton Act petitioner offered some evidence, but principally relied upon the effect of Section 5 of the Clayton Act (15 U. S. C. 16) by offering in evidence a copy of the findings, conclusions and order of the Federal Trade Commission in its hereinabove identified proceedings against respondent.

10. Section 5 of the Clayton Act (reproduced in full in the appendix hereto at p. 16) provides that:

"A final judgment or decree * * * in any suit or proceeding brought on or in behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such

defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. * * *"

11. The District Court refused to receive in evidence the order or decree of the Federal Trade Commission, wherefore it was properly identified and marked under the Rules of Civil Procedure for consideration by the Court of Appeals as to the propriety of such ruling (reproduced in the record at Vol. B, pp. 139-159).

The District Court held the respondent's patent to be not infringed, and held respondent's trade-mark to be valid and to have been infringed by petitioner. *

12. The only purchasers of bowling pins with which the evidence of the case is concerned are bowling alley proprietors. The District Court specifically found that there had not been, and under the facts of the case could not be any confusion between the trade-marked products of petitioner and respondent in the sale thereof to the only purchasers therefor, namely bowling alley proprietors. The District Court said (Vol. A, p. 110):

"We can take judicial notice of such a well known fact that bowling alleys are comparatively few in number, and while the evidence did not show how many there were, it did show that the trade, by which we mean the bowling alley owners, is a comparatively small and cohesive field for salesmen and thoroughly canvassed by both of the parties to this action. The evidence moreover discloses that the relations of manufacturer and bowling alley owner are intimate, the pins being but a small part of the

* Respondent's mark consisted of a red ring placed around the neck of bowling pins with red triangles extending upwardly from the ring in simulation of a crown. This was called "Red Crown", which words were separately registered. Petitioner's mark held to infringe consisted of a series of red diamonds connected to each other and extending around the neck of the pin.

alley's equipment. *The evidence leaves no room for inference, not to speak of a presumption, that any alley owner had any misapprehension whatever that arose from a confusion of trade marks. As a matter of fact, the plaintiff itself deserts any such claim but insists that the bowler is deceived by the defendant's use of its device.*" (Emphasis ours.)

13. As to the bowler (as distinguished from the purchaser of the pins) the District Court likewise held there was not, and on the facts of the case could not be any confusion. The Court said (Vol. B, p. 111):

"Neither mark is a mark at the 60 foot distance which separates the bowler and the pin and this distance is preserved by the foul line. We do not believe that anyone can be said to have a property right in the indistinct image or form which the plaintiff's mark must inevitably have to any eye so far from it nor do we believe that any findings can be made of its imitation by any equally distant and necessarily indistinct mark. Neither do we believe that any reasonable man has the right to rely on what he thinks he sees on the neck of a tenpin at that distance and claim to have been duped when he finds that he has been looking at another mark. Any finding depending on what a Judge thinks someone might or could see on an object of the size of a tenpin at 60 feet has no basis in determinable fact. *If anything was demonstrated to a conclusion at this trial it was that the bowler cannot identify such a mark.*" (Emphasis ours.)

14. Notwithstanding these findings by the District Court, that Court held petitioner's red diamond mark to be an infringement of respondent's red crown mark.

15. Both petitioner and respondent appealed to the Court of Appeals. On April 10, 1945 the Second Circuit Court of Appeals rendered its decision. The Court com-

prised Judge EVANS (of the Seventh Circuit) and Judges CLARK and FRANK (of the Second Circuit). Each of the Judges rendered an opinion in the case, and the Court divided among themselves on the issues presented, as follows:

- (1) As to the patent question, Judge FRANK (concurred with by Judge EVANS) declared the patent invalid without passing on infringement. Judge CLARK, in a separate opinion, dissented on the issue of validity, but indicated he favored affirmance for non-infringement.
- (2) On the trade-mark issue, Judge FRANK wrote the majority opinion (for Judges EVANS and CLARK) affirming the judgment of the District Court, but expressly dissented therefrom himself.
- (3) On the anti-trust law-Federal Trade Commission issue Judge FRANK, writing the majority opinion concurred in by Judge CLARK, reversed the District Court, finding error in its refusal to receive and give full effect to the judgment of the Federal Trade Commission under the provisions of Section 5 of the Clayton Act, Judge EVANS writing a dissenting opinion on this issue.

16. Thereafter petitioner made application for a rehearing of the trade-mark question, and respondent made application for rehearing (*inter alia*) of the anti-trust law-Federal Trade Commission question.

17. The petitions for rehearing were granted to the extent that on June 11, 1945 a *per curiam* opinion of the Court was filed (Vol. C, p. XXIX) withdrawing the prior opinion of the majority of the Court on the anti-trust law-Federal Trade Commission issue and unanimously affirming the judgment of the District Court in refusing to receive in evidence the judgment of the Federal Trade Commission

and to give the effect thereto which Section 5 of the Clayton Act provided.

18. Petitioner files this present petition requesting this Court to review:

- (1) The anti-trust law-Federal Trade Commission question of the case; as well as
- (2) The limited issue of trade-mark infringement.

The Questions Presented.

1. It is necessary to crystallize the issue in order to frame and permit a clear understanding of the questions presented by this petition on the anti-trust law-Federal Trade Commission aspect of the case.

Section 5 of the Clayton Act, as hereinbefore pointed out (*ante*, p. 3) establishes the *prima facie* effect of a "final judgment" obtained "in any suit or proceeding in equity brought by or in behalf of the United States under the anti-trust laws". Only once heretofore, so far as the law reports reveal, has a judgment of the Federal Trade Commission been proffered for the purpose of securing the *prima facie* effect prescribed by that section (*Propper v. John Beney & Sons*, 295 F. 729). In that case it was held, *inter alia* (by the District Court for the Eastern District of New York), that the judgment of the Federal Trade Commission was not a "final" judgment as required by the statute. Since that decision, however, the Federal Trade Commission Act was amended, to wit: on March 21, 1938 (15 U. S. C. 45(g)(1)) * whereby *every* order of the Commission was expressly made a "final" order upon the expiration of the time allowed for filing a petition for review (fixed by paragraph (c) of the amending section to within "60 days

* Reproduced in full in the appendix hereto at page 20.

of the date of service of the order"). Thereby, like all other injunctive decrees, one issued by the Commission, acquiesced in or unappealed from, legislatively became a "final judgment or decree". It will be recalled that the order or judgment of the Federal Trade Commission in its proceeding against respondent was entered on December 7, 1942—*after* the amendment to the Federal Trade Commission Act—and that respondent did not appeal therefrom so that the judgment of the Federal Trade Commission became a "final judgment or decree".

Respondent's petition for rehearing on this question gave as its basis (which was accepted by the Court of Appeals) that prosecution by the Federal Trade Commission for violation of Section 3 of the Clayton Act was controlled by Section 11 of that Act (15 U. S. C. 21) * and that although the Federal Trade Commission Act had been amended so that *every* order of the Commission became a "final" order if unappealed from, there was no finality of an order issued by the Commission in a prosecution for violation of Section 3 of the Clayton Act, and that there can be no finality therefor unless an adjudication is had by a Circuit Court of Appeals either on application by the Commission to enforce its order or on application by the respondent to vacate the order. In other words, it was the contention of the respondent, and the decision of the Court of Appeals on reconsideration, that because Section 11 of the Clayton Act had not been amended coincidentally with the amendment to the Federal Trade Commission Act, that amendment, giving finality to *all* orders of the Commission, was nullified in so far as was concerned any order of the Commission in a proceeding brought to enforce the Clayton Act. Obviously, the logical consequence of such reasoning is that where, as here, one

* Reproduced in full in the appendix hereto at page 16.

found to have violated Section 3 of the Clayton Act in a Federal Trade Commission proceeding could for all time defeat the benefits intended and prescribed by Section 5 of that Act by temporary dormancy (for a period determined by the statute of limitations of the particular State in which he was domiciled) or by acquiescence in and compliance with the order of the Commission.

Therefore, the questions presented on this aspect of the case are:

1. Did the amendment to the Federal Trade Commission Act, which made "final" *all* judgments or orders of the Commission if not appealed from within a prescribed period of time, leave non-final or interlocutory an order or judgment of the Commission in a proceeding which decreed that the respondent in that proceeding had violated the Clayton Act?
 2. Was it necessary to amend the Clayton Act in order to give finality to a judgment of the Commission (which was acquiesced in) that the respondent before it had violated the Clayton Act, when the amendment to the Federal Trade Commission Act made final *all* judgments of the Commission which were not appealed from?
 3. Was a judgment of the Federal Trade Commission entered on December 7, 1942, in the proceeding by the Commission against respondent for violation of Section 3 of the Clayton Act, entitled to receipt in evidence on petitioner's offer, and entitled to the *prima facies* prescribed by Section 5 of the Clayton Act?
2. On the trade-mark issues the question presented is specific and quite limited. The District Court found and

held that the only "purchasers" of the trade-marked goods were bowling alley proprietors, and that users of bowling alleys (the bowlers) were not "purchasers" of the trade-marked goods—they were merely *users* of the trade-marked goods. Together the alley proprietors and the bowlers constituted the entire "trade".

The District Court found that there was not and could not be any confusion between the trade-marked goods of petitioner and respondent insofar as the bowling alley proprietors were concerned, and, indeed, that respondent did not even claim that there was.

Insofar as the bowlers are concerned, the District Court found that there was not and could not be any confusion between the marks; that at the distance between the bowler and the pins upon which the marks appeared all marks would be indistinguishable; and that

"If anything was demonstrated to a conclusion on this trial it was that the bowler cannot identify such a mark" (Vol. A, p. III).

These findings by the District Court were adopted, undisturbed, by the Court of Appeals. Under such circumstances the question on this phase of the case is:

When it is established by the evidence and the findings of the Trial Court that there is not and can not be any confusion between the goods of petitioner and respondent with their respective trade-marks thereon, either to the purchasers or users of those goods (constituting the entire "trade" therefor), can there be trade-mark infringement?

Reasons Relied Upon for the Grant of the Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

- (1) Because the decision of the Court of Appeals on rehearing, insofar as concerns the anti-trust law-Federal Trade Commission phase of the case, involves an important question of federal law which has not been but should be passed upon by this Court.
- (2) Because the questions presented are of great public importance.

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Second Judicial Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court as to the questions herein presented, and that the judgment of the Court of Appeals be reversed insofar as it held that the order of the Federal Trade Commission was inadmissible in evidence in this cause and not entitled to the legal effect prescribed therefor by Section 5 of the Clayton Act, and insofar as it held that there was trade-mark infringement on the facts and findings of the case; and that petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM S. GLUCK,
WALTER A. DARBY,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 60 U. S. P. Q. 294, and will be found in the record at Volume A, page 106.

The original opinion of the Court of Appeals for the Second Circuit will be found in the record at Volume C, page I, and is reported at 65 U. S. P. Q. 148.

The opinion of the Court of Appeals on rehearing is unreported, but will be found in the record at Volume C, page XXIX.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is April 10, 1945; opinion on rehearing June 11, 1945.

2. The judgment was rendered in a civil action involving patent and trade-mark infringement and accounting for damages resulting from violation of the anti-trust laws.

3. The statute under which jurisdiction is invoked is 240(a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

Moore v. New York Cotton Exch., 270 U. S. 593;

Sterling v. Constantin, 287 U. S. 378;

Hurn v. Oursler, 289 U. S. 238;

Stark Bros. Nurseries & Orchard Co. v. Stark, 255 U. S. 50.

Statement.

The facts are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioner will urge, if the petition for writ of certiorari is granted, are that the Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the action of the District Court excluding from evidence the judgment of the Federal Trade Commission to thereby deny petitioner the effect of such judgment prescribed by Section 5 of the Clayton Act.

2. In holding in effect that the judgment of the Federal Trade Commission, entered December 7, 1942, in its proceeding against respondent, was not a final judgment.

3. In holding in effect that the amendment to the Federal Trade Commission Act which made all orders of the Commission "final" did not make final an order of the Commission entered in the proceeding against respondent for violation of Section 3 of the Clayton Act.

4. In affirming the judgment of the District Judge that petitioner had infringed the trade-mark of respondent.

5. In holding in effect that although, as found by the District Judge, there was and could be no confusion between the trade-marked products of petitioner and respondent, petitioner infringed respondent's trade-mark.

Argument.

1. It is believed to be unnecessary to stress the novelty and importance of the anti-trust law-Federal Trade Commission aspect of this case. Congress amended the Federal Trade Commission Act so as to make "final" *all* orders of

the Federal Trade Commission unless appealed from. Such a "final order" is entitled to the *prima facies* prescribed by Section 5 of the Clayton Act.

The decision of the Court of Appeals in this case vitiates the purpose and effect of the amendment to the Federal Trade Commission Act, as well the Clayton Act, and permits one guilty of violation of the Clayton Act, either by dormancy (for the period prescribed by the statute of limitations in the State of domicile) or by acquiescence, to completely avoid the consequences of its violation statutorily prescribed by the Clayton Act. It would seem to require nothing beyond its mere statement to establish that if all orders of the Federal Trade Commission are given finality, an order of the Commission given in a proceeding involving prosecution for violation of Section 3 of the Clayton Act necessarily must be a final order regardless of whether or not the procedural provisions of the Clayton Act are concurrently amended.

So far as could be ascertained, this is the first time that this question has arisen, and its importance and far-reaching effect are believed to be apparent. Additionally, the difficulty that the Court of Appeals below had with the issue, as illustrated by its varying and conflicting opinions, shows the necessity for consideration thereof by this Court.

2. Similarly, with respect to the trade-mark issue involved, when the Trial Court found and held that there is and can be no confusion to purchasers or users of trade-marked commodities (representing the entire "trade" in the field) there would seem to be neither legal nor logical justification for a holding of trade-mark infringement with the financial and economic consequences usually flowing therefrom.

Conclusion.

WHEREFORE petitioner earnestly prays that the petition for writ of certiorari be granted, the cause be reviewed, and the judgment of the Court of Appeals for the Second Circuit be reversed in the respects hereinbefore noted.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

WILLIAM S. GLUCK,
WALTER A. DARBY,
Of Counsel.

Dated: August , 1945.